

No. PD-0026-21

IN THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/10/2022
DEANA WILLIAMSON, CLERK

Christopher James Holder
Appellant

v.

The State of Texas
Appellee

On Appeal from the 416th District Court of Collin County, Texas, in Cause
Nos. 416-80782-2013
The Hon. Chris Oldner, Judge Presiding

MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Christopher James Holder, Appellant, in the above styled and numbered cause, by and through Steven R. Miars, his undersigned attorney of record, who respectfully files this “Motion for Rehearing,” and in support of such Motion would show the Court:

I

Finding no error in the admission of cell-phone site location information (“CSLI”), the Court of Appeals originally affirmed Appellant’s conviction in a

2016 unpublished opinion. [Holder v. State](#), No. 05-15-00818-CR (Tex.App. - Dallas; August 19, 2016)(“[Holder I](#)”). Finding that admission of the CSLI violated the Texas Constitution, this Court reversed that decision and remanded the case for a harm analysis. [Holder v. State](#), 595 S.W.3d 691 (Tex.Cr.App. 2020)(“[Holder II](#)”).

On remand, the Court of Appeals determined the error to be harmful under Rule 44.2(a), Tex.R.App.Pro. It reversed the conviction in another unpublished opinion. [Holder v. State](#), No. 05-15-00818-CR (Tex.App. - Dallas; December 15, 2020)(“[Holder III](#)”). On February 2, 2022, this Court again reversed the decision of the Court of Appeals, finding it erred in utilizing the “constitutional” harm analysis of Rule 44.2(a). [Holder v. State](#), ____ S.W.3d ____ ((Tex.Cr.App. No. PD-0026-21; February 2, 2022)(“[Holder IV](#)”). This motion for rehearing is timely filed if presented or post-marked by February 17, 2022.

II

Appellant respectfully suggests that rehearing should be granted because the Court’s opinion is incorrectly premised on the idea that Appellant “in this case did not even invoke the Fourth Amendment on appeal.” [Holder IV](#), slip op., at 4. This statement fails to recognize the convoluted procedural history of which

issues were raised on appeal, which grounds of review this Court granted review upon, and this Court's responses to the law in this area as it developed.¹

Appellant's second point of error in his first direct appeal to the Fifth Court of Appeals was that the "trial court erred in denying Holder's motion to suppress his cell phone records obtained by a court order in violation of federal law."¹ Relying upon the state of the law at that time concerning the "third party doctrine," the first opinion of the Fifth Court of Appeals rejected this claim because, at that time, the law was the Fourth Amendment provided no protection for records held by a third party. The claim was rejected because the Court of Appeals concluded that Appellant had no privacy interest in the cell phone records which was entitled to protection under the federal statute known as Stored Communications Act. That act provides that a governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a customer of such service only when the governmental entity obtains a warrant or "obtains a court order for such disclosure under subsection (d) of this section." [18 U.S.C. §](#)

¹ See [Appellant's original submission brief](#), PP. 22, 31, and 62-63.

² See [Appellant's original submission brief](#), PP. 2 and 29.

[2703\(c\)\(1\)\(A\) & \(B\)](#). [Holder I](#), slip op., at 4.

At the time Appellant filed his original brief with the Court of Appeals in *Holder I*, the Court of Criminal Appeals had already held that the State's warrantless acquisition of historical cell-site-location information recorded by the defendant's cell-phone service provider did not violate the Fourth Amendment. [Ford v. State](#), 477 S.W.3d 321 (Tex.Cr.App. 2015). Thus, the Fourth Amendment issue was settled by this Court at that time.

Therefore, in his original 2016 petition for discretionary review (“PDR”),¹ among the issues Appellant raised, were these two:

Ground Three: The Court of Appeals erred in holding the State’s petition to obtain the Appellant’s cell phone records set forth the “specific and articulable facts” required by federal law under 18 U.S.C. section 2703(d).

Ground Four: The Court of Appeals erred in holding the State’s acquisition of Petitioner’s historical cell phone records under an order issued under the federal stored communications act without a showing of probable cause in the petition was reasonable under the guarantees of privacy in Article I section 9 of the Texas constitution.

³ See [PD-1269-16](#); filed December 15, 2016.

After Appellant filed his original PDR, on June 5, 2017, the U.S. Supreme Court granted review in [*Carpenter v. United States*](#).² On the very next day, June 6, 2017, Counsel for Appellant filed a [letter to the Court](#) calling attention to the [*Carpenter*](#) case as a “supplement to Holder's brief.” Taking notice of [*Carpenter*](#), this Court granted discretionary review of Appellant’s petition for discretionary review, but only as to ground 3, which raised the federal law claim which the Court of Appeals had rejected on Fourth Amendment Grounds.

On September 27, 2017, this Court heard Oral arguments at the Texas A&M School of law on Ground 3 only and the case was ordered submitted. After submission, the U.S. Supreme Court issued its opinion in [*Carpenter v. United States*](#), _____ U.S. _____ (No. 16-402; June 22, 2018). In that case, the U.S. Supreme Court held that a court order obtained by the government under the Stored Communications Act, 18 U.S.C.S. § 2703(d), was not a permissible mechanism for accessing historical CSLI because the showing required under the Act fell well short of probable cause required by the Fourth Amendment. A warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

⁴ See also [137 S. Ct. 2211](#) (2017).

In response to *Carpenter*, on June 27, 2018, counsel for Appellant filed a “[Motion for “Remand”](#)” with this Court to remand this case to the Fifth Court of Appeals for a harm analysis of his Texas Constitutional claim, given the U.S. Supreme Court's holding in [Carpenter](#). The Court of Appeals had originally rejected that claim relying on the premise that the Texas Constitution provided protection no greater than its federal counterpart. On October 23, 2019, in response, this Court denied the request for remand. But, the Court now granted review to include Ground 4 of the original PDR and ordered supplemental briefing.³

After supplemental briefing, in [Holder II](#), this Court held that the Texas Constitution does protect cell phone/tower records. It then remanded to the Fifth Court of Appeals for a harm analysis. The Court of Criminal Appeals, however, never addressed the original issue it had granted review of in Ground 3.

The Fifth Court of Appeals held Appellant had been harmed by the erroneous admission of the evidence, using the constitutional measure for review. This Court has now rejected that standard of review for error under the Texas

³ See [Order of October 23, 2019](#).

Constitution and remanded the case to the Fifth Court of Appeals for review under the non-constitutional standard of review for error.

Ultimately, this Court has never addressed the original Ground for Review on which it granted review, which is whether acquiring Appellant's cell phone records violated federal law. Instead, the Court now writes that, “Unlike Love, Appellant in this case did not even invoke the Fourth Amendment on appeal. He cannot rely on the federal exclusionary rule to argue that the CSLI records should be suppressed.” [*Holder IV*](#), slip op., at 4-5. Respectfully, this is an inaccurate statement.

The fair and appropriate course of action to provide due process on appeal is for this Court is to grant rehearing and address the original issue on which this Court granted PDR:

The Court of Appeals erred in holding the State’s petition to obtain the Appellant’s cell phone records set forth the “specific and articulable facts” required by federal law under 18 U.S.C. section 2703(d).

In [*Carpenter*](#), the Supreme Court rested its decision in a finding that supports Appellant's original contention (and the issue upon which this Court originally granted review), that acquiring his cell records violated federal law because they were obtained without a finding of probable cause required under

the fourth amendment. The Court should now address this issue.

Prayer

WHEREFORE PREMISES CONSIDERED, Appellant respectfully prays this Honorable Court will grant his Motion for Rehearing, vacate its opinion of February 2, 2022, and remand this case to the Court of Appeals for reconsideration of Appellant's Fourth Amendment claim, given [Carpenter](#).

Certificate of Compliance and Service

This is to certify that: (1) this document, created using MSWord software, Contains 1205 words, excluding those items permitted by Rule 9.4 (i)(2)(B), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) February 9, 2022, a true and correct copy of the above and foregoing motion was transmitted via the eService function on the State's eFiling portal, to Emily Johnson-Liu (information@spa.texas.gov) and Libby Lange (llange@co.collin.tx.us), attorneys of record for the State of Texas.

Respectfully submitted,

/s/ Steven R. Mears

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